



ASSOCIATION OF NATIONAL ADVERTISERS, INC.  
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MEMBER, WORLD FEDERATION OF ADVERTISERS

November 26, 1990  
A.N.A.'s 81st Year

Washington State Liquor Control Board  
1025 East Union  
Olympia, Washington 98504

Attn: Carter Mitchell  
Public Information Officer

Dear Sirs:

The Association of National Advertisers (A.N.A.) is pleased to submit its views regarding the proposed amendments on advertising to the Washington State Liquor Code.

In A.N.A.'s view, the proposed Washington regulations are patently unconstitutional. The regulations are so vague, undefined and overbroad that they threaten all truthful nondeceptive alcohol beverage advertising in the state of Washington. Furthermore, these regulations are unnecessary as false or deceptive advertising, or advertising which targets underage consumers, is already illegal and can be banned or restricted by the Federal Trade Commission and the Bureau of Alcohol Tobacco and Firearms of the United States Department of the Treasury. Sweeping censorship of lawful speech is not the answer. We strongly urge the Washington State Liquor Control Board to reject these well-meaning but misguided proposals.

In order to help in your review of these critical issues, the attached analysis of the proposed amendments was prepared for A.N.A. by the distinguished First Amendment scholar, Burt Neuborne, of the New York University School of Law. Mr. Neuborne has been a full Professor at NYU since 1976. He joined the New York Civil Liberties Union in 1967 and served as Assistant Legal Director of the American Civil Liberties Union from 1972 to 1974. From 1982 to 1986, he was National Legal Director of the ACLU. He is well known as one of the most active and knowledgeable civil liberties lawyers in the nation.

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<b>DEFENDANT'S EXHIBIT</b>	
CASE NO.	C04-0360P
EXHIBIT NO.	510

WBW-004238

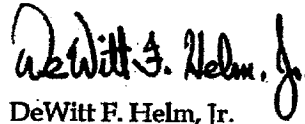
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The Association of National Advertisers, Inc., the industry's oldest trade association, is the only organization exclusively dedicated to serving the interests of corporations that advertise either regionally or nationally. The Association's advertiser membership is, in composite, a cross section of all segments of American industry. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a variety of goods and services and collectively account for almost 80 percent of all annual regional and national advertising expenditures in the United States.

Let us emphasize that the position of A.N.A. on the Washington regulations is derived from our strong concern for the protection of all advertising, the cornerstone of the American economic system. Of the more than 2,000 companies that comprise A.N.A., only twelve are in the business of producing alcohol beverage products. We believe the broad and dangerous precedents embodied in these proposals, however, would adversely effect advertisers in general.

We respectfully request that the Washington State Liquor Control Board carefully consider the views of A.N.A. before rendering a decision on the proposed regulations.

Sincerely,



DeWitt F. Helm, Jr.

Enclosure

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Burt Neuborne

November 20, 1990

Washington State Liquor Control Board  
1025 East Union,  
Olympia, Washington 98504

Attn: Carter Mitchell  
Public Information Officer

Dear Sirs:

I write on behalf of the Association of National Advertisers (A.N.A.) to express concern over proposed regulations designed to further limit the advertisement of lawful alcoholic beverages in the State of Washington. While the proposed regulations are doubtless well-intentioned, they are, in A.N.A.'s opinion, unconstitutionally overbroad. The sweep of the proposed regulations would prohibit a host of innocuous and clearly protected statements. Thus, A.N.A. believes that the proposed regulations violate the First Amendment to the United States Constitution.

It is now indisputable that the truthful advertisement of lawful products is entitled to significant First Amendment protection. Eg. Peel v. Attorney Registration and Disciplinary Comm'n, 110 S.Ct. 2281 (1990); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85

(1977); Carey v. Population Services, Inc., 431 U.S. 678 (1977); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Central Hudson Gas & Electric Co. v. Public Service Comm'n, 447 U.S. 557 (1980); In re RMJ, 455 U.S. 191 (1982); Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985); Shapero v. Kentucky Bar Ass'n., 486 U.S. 466 (1988).

Although the Twenty-First Amendment grants power to the States to regulate or prohibit the sale of alcoholic beverages, once a State determines that the sale of alcoholic beverages is lawful, A.N.A. believes that the First Amendment protects the free flow of information to consumers about the lawful product. In Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984), for example, the Supreme Court rejected an argument that the Twenty-First Amendment justified Oklahoma's attempt to ban liquor advertising on cable television stations, holding that the Oklahoma ban was preempted by federal law. If the Twenty-First Amendment did not prevent preemption in Capital Cities Cable, it certainly cannot prevent the operation of the First Amendment. See also, Michigan Beer & Wine Wholesalers Ass'n v. Attorney Gen'l of Michigan, 142 Mich.App. 294, 370 NW 2d 328 (1985), cert. denied, 479 U.S. 939 (1986) (invalidating regulations severely limiting advertising of alcoholic beverages); Adolph Coors Co. v. Baker, No. 87Z977 (D. Colo. 1989) (invalidating law prohibiting disclosure of alcohol content on beer labels and advertising); Oklahoma Broadcasters Ass'n v. Crisp, 12 Media L.

Rep. 2379 (W.D. Okla. 1986) (invalidating regulation of liquor advertising). In light of Supreme Court precedent, Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983), cert. denied, 467 U.S. 1259 (1984), cannot be used to justify the type of overbroad and unjustified censorship contemplated by the proposed regulations.

Once First Amendment protection attaches, the Supreme Court has ruled in Central Hudson that a proposed regulation of commercial speech must "directly" advance a "significant" state interest and may not be broader than reasonably necessary. The proposed regulations cannot pass muster under the Central Hudson test because they do not "directly" advance Washington's legitimate interest in regulating speech intended to promote overconsumption or to target underage consumers. Instead, the regulations purport to ban innocuous speech which Washington has absolutely no interest in regulating.

For example, the flat ban on advertising that "depicts as amusing... a state of intoxication" would preclude a witty public service ad designed to poke fun at overconsumers. Moreover, it would preclude a witty advertisement that chides overconsumers as part of a traditional commercial message. Whatever interest Washington may have in regulating speech that glorifies overconsumption, banning all "amusing" depictions of intoxication is far too broad a prohibition.

While advertising that seeks to "promote overconsumption" would, of course, give rise to a legitimate state concern, such

advertising is already banned by Washington's existing regulation. Accordingly, the fit between Washington's legitimate concern with "promoting overconsumption" and the overbroad language of the proposed regulation flatly banning all "amusing" depictions of intoxication is far too loose to survive First Amendment scrutiny.

Similarly, the proposed flat ban on advertising that implies a link between professional or social achievement and the use of liquor is both unconstitutionally vague and hopelessly overbroad. The lawful consumption of alcoholic beverages in a social setting is so widespread that any attempt to advertise the product is likely to depict its consumption in attractive social settings. Would a cheerful group depicted as lawfully consuming an alcoholic beverage be deemed a violation of the regulation? If so, what legitimate interest does Washington assert in seeking to ban advertisers from accurately depicting the social conditions that surround the use of a lawful product? Moreover, while Washington's interest in assuring an accurate representation of the relationship between alcohol consumption and professional achievement is obvious, no legitimate interest exists in banning advertisements by successful professionals who find the lawful consumption of alcoholic beverages an enjoyable activity. Washington's asserted interest in regulating liquor advertising in the first place is in preventing overconsumption and underage drinking. It has no legitimate interest in seeking to regulate truthful speech about lawful behavior that in no way

seeks to encourage overconsumption or underage drinking.

Third, the attempt to ban "anything designed or intended to attract" underage drinkers is far too broad. Intentional attempts to persuade underage persons to drink are reprehensible.

Fortunately, no responsible advertiser seeks to reach an underage audience. However, the addition of the phrase "designed" to the phrase "intended" in the regulation suggests that an advertisement that might be viewed as attractive by an underage viewer is unlawful, even if the ad is intended to attract a lawful age group. Such an attempt to measure the lawfulness of speech directed to adults by its potential effect on children has been repeatedly rejected by the Supreme Court. As Justice Marshall has stated, speech directed to the adult population cannot be reduced to the level of the sandbox. Eg. Sable Communications Co. v. FCC, 57 USLW 4920 (1989).

Finally, the attempt to ban any advertisement suggesting a relationship between "... toys, or clothing in children's sizes or intended for children and brand recognition" bears no relationship to any discernible state interest. Presumably, the use of a teddy bear in an advertisement is not likely to cause a toddler to drink. What possible interest does Washington have in banning an ad showing parents cleaning up after their children while sharing a glass of wine or a beer?

Accordingly, A.N.A. urges the Liquor Control Board to reject the proposed regulations as flatly inconsistent with the notions of free speech and free consumer choice that are the